IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

	)	
	)	
IN THE MATTER OF	)	
THE CARE AND TREATMENT	)	No. 24198
OF JAMES FRANCIS,	)	
Respondent/Appellant.	)	Oral Argument Requested
	)	
	)	

APPEAL TO THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
FROM THE CIRCUIT COURT OF BUTLER COUNTY
36TH JUDICIAL CIRCUIT
THE HONORABLE WILLIAM J. CLARKSON

APPELLANT'S REPLY STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT, STATEMENT OF FACTS, POINTS RELIED ON, AND ARGUMENT

Francis reaffirms and incorporates by reference the Jurisdictional Statement, Statement of Facts, Points Relied On, and Argument contained in his Statement, Brief, and Argument, filed with this Court on October 22, 2001.

POINTS RELIED ON

I

The trial court erred and abused its discretion when it (a) denied Francis' motion for summary judgment, and/or b) submitted Instruction No. 6 while refusing Francis' proffered Instruction Nos. 6A and/or C. The state failed to prove, and the trial court failed to instruct the jury, that as a result of a mental abnormality, Francis lacks volitional capacity to control his behavior. Francis was prejudiced by the trial court's error(s) because there was insufficient evidence that he could not control his conduct. Had the trial court required proof of lack of volitional capacity, the outcome of the trial would have been different.

Any interpretation of Section 632.480 RSMo (the SVP statute) that excludes a requirement that the state must prove lack of volitional capacity is unconstitutional and in violation of the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. That interpretation permits the state to deprive a person of their liberty solely upon proof that he suffers from a mental abnormality that predisposes him to commit sexually violent offenses without also requiring a showing of inability

to control conduct. The trial court's rulings deprived Francis of his liberty pursuant to a statute which, on its face and as applied by the trial court, violates the guarantees of due process and the jury which convicted him did not hear evidence of Francis' volitional capacity, nor was it instructed that before finding Francis to be an SVP, it had to determine that he is unable to refrain from committing sexually violent acts.[1].

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997);

In the Matter of Crane, 7 P.3d 285 (Kan. 2000);

In re Linehan, 594 N.W.2d 867 (Minn. 1999);

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114 (1996);

Section 632.480, et seq. RSMo;

U.S. Const. Amends. 5, 14;

Mo. Const. Art. I, Sec. 10.

II

The trial court erred when it denied Francis' motion to dismiss the state's petition because the SVP statute violates the Equal Protection Clauses of Article I, Section 2 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Equal Protection requires that similarly situated persons be treated similarly. If a person is involuntarily committed to DMH for

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[1] While Francis challenges every point raised in Respondent's brief, Francis will specifically reply only to Points I and II.

reasons other than a SVP finding, the DMH must place him in the least restrictive environment. The SVP statute has no such requirement – any person found to be a SVP is automatically committed to the custody of the DMH and placed in a secure facility with no regard for whether that person can be placed in a less restrictive environment. There is no rational basis for the disparate treatment of the two classes of persons. Francis was prejudiced by the trial court's error because there was no evidence of or consideration given to placing him in the least restrictive environment. Thus, Francis was deprived of his liberty pursuant to a statute that, on its face and as applied, violates the Equal Protection Clauses.

Baxtrom v. Herold, 383 U.S. 107, 86 S.Ct. 760 (1966);

In re Young, 857 P.2d 989 (Wash. 1993);

Section 632.300 RSMo et seq;

Section 632.480, et seq. RSMo;

U.S. Const. Amends. 5, 14;

Mo. Const Art. I, Sec. 2.

ARGUMENT

I

The trial court erred and abused its discretion when it (a) denied Francis' motion for summary judgment, and/or b) submitted Instruction No. 6 while refusing Francis' proffered Instruction Nos. 6A and/or C. The state failed to prove, and the trial court failed to instruct the jury, that as a result of a mental abnormality, Francis lacks volitional capacity to control his behavior. Francis was prejudiced by

the trial court's error(s) because there was insufficient evidence that he could not control his conduct. Had the trial court required proof of lack of volitional capacity, the outcome of the trial would have been different.

Any interpretation of Section 632.480 RSMo (the SVP statute) that excludes a requirement that the state must prove lack of volitional capacity is unconstitutional and in violation of the Due Process Clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. That interpretation permits the state to deprive a person of their liberty solely upon proof that he suffers from a mental abnormality that predisposes him to commit sexually violent offenses without also requiring a showing of inability to control conduct. The trial court's rulings deprived Francis of his liberty pursuant to a statute which, on its face and as applied by the trial court, violates the guarantees of due process and the jury which convicted him did not hear evidence of Francis' volitional capacity, nor was it instructed that before finding Francis to be an SVP, it had to determine that he is unable to refrain from committing sexually violent acts.

1. Hendricks prohibits commitment of those who can control their behavior.

Respondent argues that the United States Supreme Court decision in Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997) does not bar the civil commitment of those who are able to refrain from sexually violent conduct (Resp. Br. 34). In making this argument, the State materially misconstrues Hendricks. The State seems to characterize those portions of the Hendricks decision, upholding the Kansas SVP statute

because it limited its sweep to those who could not refrain from sexually violent acts, as essentially dicta (Resp. Br. 33-35). The basis for the Court's judgment is not "dicta." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 67, 116 S.Ct. 1114, 1128 (1996). The Hendricks court was called upon to decide under what circumstances a person judged to be an SVP could be involuntarily committed. Hendricks, 521 U.S. at 349, 117 S.Ct. at 2076. Specifically, the issue before the Court was whether the definition of an SVP in the Kansas statute – which provided for the commitment of persons having a "mental abnormality," rather than "mental illness" – was consistent with the Due Process Clause of the United States Constitution. Id. at 355-56, 117 S.Ct. at 2079.

The Hendricks Court upheld the Kansas SVP scheme because it found that due process did not require a finding of "mental illness" for some one to be involuntarily committed for treatment. Id. It rejected Hendricks' claim that his confinement could not be predicated on a "mental abnormality" – a term which he characterized as devoid of medical or psychological meaning. Id. at 358-59, 117 S.Ct. 2080-81. The Court noted that the Due Process Clause did not require any particular nomenclature and stated that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as 'mental illness' or 'mental abnormality.'" Id. at 358, 117 S.Ct. at 2080.

The Supreme Court also held that "[t]hese added statutory requirements **serve to limit involuntary civil confinement to those who suffer from a volitional impairment**

rendering them dangerous beyond their control." Id. at 358, 117 S.Ct. at 2080 (**emphasis** added). The Court upheld the Kansas scheme because it

> require[d] a finding of future dangerousness, and then link[ed] that finding to the existence of a 'mental abnormality' or 'personality disorder' **that makes it difficult, if not impossible, for the person to control his dangerous behavior.** Kan. Stat. Ann. Sec. 59-29a02(b) (1994). The precommitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it **narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.**

Id. at 358, 117 S.Ct. at 2080 (emphasis added). Thus, the Hendricks Court did not state – as Respondent would have this Court believe – that **any** "mental abnormality" or "personality disorder" that causes a person to be dangerous would permit involuntary commitment, just those ailments that rendered that person unable to control their dangerous behavior.

The Court noted that "[t]hose persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that **prevents them from exercising adequate control over their behavior.** Such persons are unlikely to be deterred by the threat of confinement." Id. at 362-363, 117 S.Ct. at 2081 (emphasis added). The Hendricks Court's decision that Hendricks could be committed on the basis of a "mental abnormality" was, therefore, predicated upon its finding that the Kansas commitment statute limited confinement to those who could not control their behavior.

The limited sweep of the Kansas SVP statute, as interpreted by the Hendricks Court, was the reason that it comported with Due Process. Nonetheless, the State would have this Court disregard the very basis for the Hendricks decision as "dicta." Contrary to the State's position here, in mentioning Hendricks' lack of control, the Hendricks court was not merely discussing the facts of the case, as Respondent would have this Court believe, it was establishing its rationale for upholding the Kansas statute (Resp. Br. 33-36).

Appellate courts in Kansas and Minnesota differ with Respondent's analysis and found that Hendricks required that a person subject to commitment be found to have a volitional impairment that renders him unable to adequately control his actions. In the Matter of Crane, 7 P.3d 285 (Kan. 2000); In re Linehan, 594 N.W.2d 867 (Minn. 1999).

Respondent criticizes Crane, purportedly for "not articulating a rationale" for requiring a volitional impairment (Resp. Br. 35). Respondent does not see any meaningful distinction between a person who cannot refrain from sexually violent conduct and a person who can stop himself, but for whatever reason, will not do so (Resp. Br. 35). According to the State, "Nothing in Hendricks suggests that the Crane line [of cases] would make sense to the U.S. Supreme Court" (Resp. Br. 35*)*. Not true. By repeatedly emphasizing that it was upholding the Kansas Act because it was limited to those with volitional impairments, the Hendricks Court would see those cases as logical applications of the reasoning it employed.

The rationale for the distinction between persons who can and who cannot control their behavior is fairly straightforward. The Hendricks Court noted that those suffering

under a volitional impairment "are unlikely to be deterred by the threat of confinement." Hendricks, supra, at 362-363, 117 S.Ct. at 2081. On the other hand, people who can control their behavior, can be deterred from acting out by the possibility of discovery and punishment. As the Hendricks Court stated, these persons are distinguished from Hendricks –who lacked volitional control over his actions – and, unlike Hendricks, are "more properly dealt with exclusively through criminal proceedings." Id. at 760, 117 S.Ct. at 2081. Therefore, the only way to deal with the dangerous impulses of those who **cannot** control their behavior is to confine them for treatment. However, those who can control their behavior can be deterred through the threat of ordinary criminal sanctions.

Under Hendricks, the State is permitted to deal with those who have "irresistible desires" to commit sexually violent acts by confining them for treatment until they are cured. Therefore, in those cases, commitment satisfies substantive due process. This is the common thread that began in Hendricks and runs through Linehan and Crane. The converse is laid out in Hendricks: a person who has desires that he does not resist – but could if he wanted to – must be dealt with through the normal criminal process.

The Hendricks court stated as much when it held that those lacking a volitional impairment are "more properly dealt with exclusively through criminal proceedings." Id. at 760, 117 S.Ct. at 2081.

The weakness of Respondent's arguments are readily apparent from the fact that it only cites tangentially to Hendricks in arguing that due process permits confining in a mental institution those who can control their behavior (Resp. Br. 31-34). Other than critiquing Francis' reliance on Hendricks – which it asserts is misguided – the State

ignores it, preferring to base its argument upon one pre-Hendricks Supreme Court case, Foucha v. Louisiana, 504 U.S. 71, 112 S.Ct. 1780 (1992), this Court's opinion in State v. Revels, 13 S.W.3d 293 (Mo. banc 2000), and In re Gordon, 102 Wash.App. 912, 10 P.3d 500 (Wash. App. 2000). Respondent cannot rely on these cases to support its argument.

Francis submits that the Supreme Court's opinion in Hendricks is unquestionably the leading authority on the constitutionality of SVP commitment. Respondent cites In re Linehan, 557 N.W.2d 171, 182 (Minn. 1996) for the proposition that Foucha was "the leading United States Supreme Court case on the subject" (Resp. Br. 38, internal quotes omitted). This case has been superceded by In re Linehan, 594 N.W.2d 867 (Minn 1999), which was decided after the U.S. Supreme court remanded the earlier case for reconsideration in light of Hendricks. Linehan, 594 N.W.2d at 871. The later Linehan case does not apply Foucha, but rather relies on Hendricks for its analysis. Id. at 871-76.

Further, neither Foucha nor Revels deal with the topic: both cases involved the continuing confinement of persons who had been acquitted of criminal charges on the grounds of insanity and who remained confined after trial. Foucha, supra, at 73-75, 112 S.Ct. at 1782-83; Revels, supra, at 294-95. It is clear that Hendricks, not Foucha or Revels, is determinative on this question. This is particularly apparent from the fact that In re Gordon, cited by Respondent, purports to apply Hendricks but not Foucha in making its decision that Washington's SVP statute is constitutional. In re Gordon, supra, at 917, 10 P.3d 500, 502 (Resp. Br. 31, 33).

Although Respondent faults Crane, supra, for supposedly lacking analysis, the In re Gordon decision truly fails in this regard. Gordon argued that the jurors in his case

were misinstructed because they were not required to find that he was unable to control his actions. In re Gordon, supra, at 917, 10 P.3d at 502. The Washington Court of Appeals noted the language in Hendricks where the Court held that the Kansas SVP act was constitutional because it was limited to those who had a volitional defect. In re Gordon, supra, at 917-18, 10 P.3d 502. However, the Gordon court held that the Supreme Court's discussion on this topic merely reflected that it was "troubled by the prospect of commitment based on only a general finding of dangerousness and a condition, such as a mental illness or abnormality, that deprives the individual of his ability to control that dangerousness." Id. at 918, 10 P.3d at 503. The Gordon court then went on to say that Washington's statute passed muster under Hendricks by requiring a link between the prisoner's "mental abnormality or personality disorder" and "the likelihood that he or she will engage in predatory acts of sexual violence in the future." In re Gordon, supra, at 918, 10 P.3d at 503. What the court in Gordon overlooked – and the Hendricks, Crane, and Linehan courts did not – was the fact that some mental abnormalities do not deprive a person of his free will and do not render him unable to control his acts.

Put another way, there are people whose disorders cause them to have desires to, for example, molest children. In all those people, their conduct is linked to their disorder. However, not all of those people have been rendered unable to resist those desires. A person who can resist those desires can be deterred from reoffending by the threat of discovery, capture and imprisonment. A person who cannot resist those desires will not be deterred by anything, so may, under Hendricks, be confined for treatment.

2. Francis was prejudiced by the erroneous verdict director because there was no evidence at trial that Francis lacked volitional control over his actions.

Respondent asserts that the evidence established beyond dispute that Francis lacked the volitional capacity to refrain from acts of sexual violence (Resp. Br. 44-45). Respondent, citing Linehan, argues there was sufficient evidence to support a finding that Francis lacked "adequate control of his harmful sexual impulses" (Resp. Br. 45) (internal quotes omitted). Respondent states that evidence of Francis' past actions is evidence of lack of volitional capacity (Resp. Br. 44-45). There is no basis upon which to make such an assumption. In fact, Hendricks requires more than a lack of "adequate" control in order for a person to be confined. As the Crane decision noted, Hendricks mandates a lack of control, without the qualifier "adequate."

Hendricks requires that the State show that Francis suffered from a volitional impairment that rendered him unable to control his sexual impulses. The jury in this case was not instructed that they had to make such a finding before it rendered its verdict. Respondent asserts that even if proof of volitional capacity is required, the state met that burden (Resp. Br. 44-46). That is not the point. The jury was not in any way required to find that Francis lacked **any** level of control over his behavior. The word "control" is found nowhere in the instruction. The jury was directed to conclude that Francis was an SVP if they found that he had a "a congenital or acquired condition affecting the **emotional *or* volitional** capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others" (App. Br. 17).

Put differently, the jury was instructed to order Francis involuntarily committed if it found that his mental abnormality had **any** affect **whatsoever** upon either his emotional **or** volitional capacity, regardless of whether or not it substantially impaired his ability to control his actions. Even applying the watered-down standard proposed by Respondent, this instruction does not pass muster under Hendricks. Since this matter was very much in dispute, Francis was prejudiced by the omission of that element from the verdict director.

3. In the alternative, this Court cannot, consistent with the intent of the Legislature, read a volitional impairment into the SVP statute.

Francis argued in his brief that this Court cannot add a volitional impairment to the SVP statute (App. Br. 28-30). The definition of an SVP encompasses anyone who had a mental abnormality affecting "the **emotional *or* volitional** capacity to commit sexually violent offenses." Section 632.480 (2) (2000) RSMo (emphasis added). Thus, as discussed above and in Point I of Francis' brief in chief, the Legislature cast a much broader net when it enacted the SVP statute than is permitted by Hendricks. Since the definition of an SVP is inextricably intertwined with the entire statute and this Court cannot assume that the Legislature would have enacted the statute if it knew its reach would be restricted, Francis argued that the statute must be struck down *in toto* (App. Br. 27-30).

Respondent asserts it is "absurd" to conclude that the legislature would "prefer to release all mentally ill people likely to commit sexually violent offenses rather than to commit at least the worst of them" (Resp. Br. 42). That is exactly Francis' point.

Francis' argument is that, under the governing Missouri rules of statutory construction, this Court cannot bring the SVP statute into compliance with Hendricks without materially changing its meaning (App. Br. 27-30). Obviously, Kansas and Minnesota have their own cannons of statutory interpretation which permitted the Crane and Linehan courts to read a volitional impairment requirement into the statutes at issue in those cases. For the reasons put forth in Francis' brief, this Court cannot assume that the Legislature would have enacted the SVP statute had it known that its reach would have been restricted by Hendricks.

For the forgoing reasons, the trial court erred when it (a) denied Francis' motion for directed verdict, or, (b) overruled Francis' objection to Instruction 6 while refusing his proffered Instructions No. 6A and/or C. The SVP statute violates the guarantees of due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution because it permits the State to deprive a person of their liberty solely upon proof that he suffers from a mental abnormality that predisposes him to commit sexually violent offenses. Due process requires that no person be involuntarily committed except upon proof that he is unable to control his behavior. This Court must, therefore, declare that the Missouri SVP statute is unconstitutional, reverse the judgment of the lower court and either order that Francis be discharged from custody or be given a new trial.

II

The trial court erred when it denied Francis' motion to dismiss the state's petition because the SVP statute violates the Equal Protection Clauses of Article I,

Section 2 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Equal Protection requires that similarly situated persons be treated similarly. If a person is involuntarily committed to DMH for reasons other than a SVP finding, the DMH must place him in the least restrictive environment. The SVP statute has no such requirement – any person found to be a SVP is automatically committed to the custody of the DMH and placed in a secure facility with no regard for whether that person can be placed in a less restrictive environment. There is no rational basis for the disparate treatment of the two classes of persons. Francis was prejudiced by the trial court's error because there was no evidence of or consideration given to placing him in the least restrictive environment. Thus, Francis was deprived of his liberty pursuant to a statute that, on its face and as applied, violates the Equal Protection Clauses.

Respondent's argument is essentially that the two classes of involuntary committees – those committed pursuant to Section 632.355 RSMo and those committed pursuant to Section 632.495 RSMo – are dissimilar and therefore not similarly situated for equal protection analysis because only Section 632.495 requires a finding that the person is dangerous if not confined in a secure facility (Resp. Br. 48-49). Respondent goes on to call Francis' comparison "silly" (Resp. Br. 49).

The only thing "silly" about it is reading the non-SVP involuntary civil commitment statute as serving a different purpose from the SVP statute, as this Court must if it is to accept Respondent's position. The SVP statute is for the purpose of protecting society and for treatment of the person adjudged to be a SVP. Kansas v. Hendricks, 521 U.S.

346, 117 S.Ct. 2072, 2084-2085 (1997). Likewise, the regular involuntary civil commitment statute is for the purpose of protecting society and treating the ill person. The Legislature could not have concluded that one danger to society is worse than another, when the purposes of the statutes are the same. The non-SVP involuntary civil commitment statute encompasses someone who could potentially kill another – and the Legislature could not reasonably conclude that such a harm is less egregious than a sex offense.

Thus, giving the language of Section 632.480, defining a SVP as one who will likely reoffend "if not confined in a secure facility" talismanic significance misses the mark. It is unreasonable to read the seven words quoted above as somehow separating the two classes. Section 632.480 is simply a definitional statute. The two classes (SVP committees and non-SVP committees) are set apart from society by a mental illness/abnormality in conjunction with dangerousness, which is specifically defined in the SVP statute as being "more likely than not to … reoffend if not confined in a secure facility." Section 632.480.

The words and context of the phrase "if not confined in a secure facility" clearly show it is not meant to have a separate significance, and is not comparable in words or context to Section 632.355.3, which sets out what remedies the court may employ for a non-SVP committee. What *is* comparable to Section 632.355.3 is Section 632.495, which sets out what remedies the court must employ for a SVP committee.

And there is the issue: two classes of comparable involuntary civil committees, found to have a mental illness/abnormality and dangerousness, being treated differently.

This situation is the one that the Court in Baxtrom v. Herald, 383 U.S. 107, 86 S.Ct. 760 (1966) found wanting.

For the foregoing reasons, the trial court erred when it denied Francis' Motion to Find the SVP statute in violation of the Equal Protection Clause. The SVP statute violates the guarantees of the Equal Protection Clause of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Missouri Constitution because, unlike other persons involuntarily committed, a person found to be a SVP does not have the benefit of the court considering less-restrictive alternatives to total confinement. This Court must, therefore, declare that the Missouri SVP statute is unconstitutional, reverse the judgment of the lower court and order that Francis be discharged from custody, or grant him a new trial in which the jury is instructed on considering less restrictive alternatives to total confinement in a secure facility.

CONCLUSION

WHEREFORE, for the reasons set forth in Points I-IV of this brief, Francis respectfully requests this Court reverse the trial court's finding that he is a SVP and discharge him from confinement, or in the alternative remand for a new trial. Should this Court determine that any of the claims represent a colorable challenge to a state statute, Francis requests this Court transfer this case to the Missouri Supreme Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this ___ day of _____ 2002, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(g). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 7750 words, 550 lines, or 25 pages. The word-processing software identified that this brief contains ____ words, excluding the cover page, signature block, and certificates of service and compliance. In addition, I hereby certify that the enclosed diskette has been scanned for viruses with McAfree Anti-Virus software and found virus-free.

_____
Nancy L. Vincent